SUPREME COURT OF MISSOURI
en banc

August 28, 2001

Effective January 1, 2002

IN RE: REVISIONS AND ADDITIONS TO MAI-CIVIL

TABLE OF INSTRUCTIONS

MAI 5.01 DAMAGES – WRONGFUL DEATH
(Committee Comment – Revision)

MAI 6.01 WRONGFUL DEATH – MITIGATING CIRCUMSTANCES
(Committee Comment – New)

MAI 21.03 DAMAGES – ACTIONS AGAINST HEALTH CARE PROVIDERS – NO COMPARATIVE FAULT
(Notes on Use – Revision)

MAI 21.04 DAMAGES – ACTIONS AGAINST HEALTH CARE PROVIDERS – COMPARATIVE FAULT
(Notes on Use – Revision)

MAI 21.09 DAMAGES – ACTIONS AGAINST HEALTH CARE PROVIDERS – LOST CHANCE OF SURVIVAL – NO COMPARATIVE FAULT
(Committee Comment – Revision)

MAI 21.11 DAMAGES – ACTIONS AGAINST HEALTH CARE PROVIDERS – LOST CHANCE OF SURVIVAL – COMPARATIVE FAULT
(Committee Comment – Revision)

MAI 21.12 DAMAGES – ACTIONS AGAINST HEALTH CARE PROVIDERS – LOST CHANCE OF RECOVERY (NON-DEATH) CASES – NO COMPARATIVE FAULT
(Notes on Use – Revision)

MAI 21.15 DAMAGES – ACTIONS AGAINST HEALTH CARE PROVIDERS – LOST CHANCE OF RECOVERY (NON-DEATH) CASES – COMPARATIVE FAULT
(Notes on Use – Revision)

MAI 37.03 COMPARATIVE FAULT – DAMAGES
(Notes on Use – Revision)

MAI 37.08 COMPARATIVE FAULT – DAMAGES – PERSONAL INJURY AND LOSS OF CONSORTIUM, LOSS OF SERVICES OR MEDICAL EXPENSES – SPOUSE OR CHILD INJURED
(Notes on Use – Revision)

O R D E R

1. Revisions and additions of previously approved MAI-CIVIL Instructions, Notes on Use and Committee Comments as listed above, having been prepared by the Committee on Jury Instructions - Civil and reviewed by the Court, are hereby adopted and approved.

2. The Instructions, Notes on Use and Committee Comments revised as set forth in the specific exhibits attached hereto must be used on and after January 1, 2002, and may be used prior thereto; any such use shall not be presumed to be error.

3. It is further ordered that this order and the specific exhibits attached hereto shall be published in the South Western Reporter and the Journal of The Missouri Bar.

Day - to - Day

_____
STEPHEN N. LIMBAUGH, JR.
Chief Justice

32.29 [2002 New] Affirmative Defenses – Failure to Mitigate Damages

(Approved August 28, 2001; Effective January 1, 2002)

If you find in favor of plaintiff, you must find that plaintiff failed to mitigate damages if you believe:

First, plaintiff (*insert act sufficient to constitute failure to mitigate, such as "failed to return to work"*), and

Second, plaintiff thereby failed to use ordinary care[1], and [2]

Third, plaintiff thereby sustained damage that would not have occurred otherwise.

Notes on Use (2002 New)

(Approved August 28, 2001; Effective January 1, 2002)

1. The term "ordinary care" must be defined. See definitions in Chapter 11.00.

2. If more than one specification of failure to mitigate damages is appropriately submitted, modify Paragraph First to submit such specifications in the disjunctive and modify Paragraph Second to read:

"Second, plaintiff, in one or more of the respects submitted in Paragraph First, thereby failed to use ordinary care, and ".

Committee Comment (2002 New)

(Approved August 28, 2001; Effective January 1, 2002)

In the past, varied approaches have been suggested for the manner of instructing on the issue of mitigation of damages. For example, the plurality opinion in *Love v. Park Lane Medical Center*, 737 S.W.2d 720 (Mo. banc 1987), suggested using a comparative fault approach. The product liability statute, section 537.765, RSMo, also could be read to suggest a comparative fault approach. *Tillman v. Supreme Exp. & Transfer, Inc.*, 920 S.W.2d 552 (Mo. App. 1996), seemed to indicate that MAI 6.01 is the correct approach, although it also observed that MAI 6.01 is limited to wrongful death cases.

In fact, rather than the doctrine of avoidable consequences, MAI 6.01 submits a completely different type of mitigation (mitigating circumstances attendant upon the fatal injury in a wrongful death case pursuant to section 537.090, RSMo.). *Tillman* also rejected the comparative fault approach to mitigation of damages. In order to avoid potential inconsistencies in alternative methods of submission (comparative fault approach in some cases, the FELA approach in other cases, and yet other possible approaches in other cases), the Committee has concluded that it is best to adopt a uniform approach to the submission of the doctrine of mitigation of damages in all cases as reflected in MAI 32.29 and the revision of MAI 4.01. This approach is both legally and logically correct and consistent with the approach already taken in FELA cases

(See MAI 32.07(A) and MAI 8.02). It is also in compliance with the mandate of section 537.765 that failure to mitigate damages “shall diminish proportionately the amount awarded as compensatory damages...”; thus, the method of submission of mitigation of damages in a product liability case should also utilize the approach taken in MAI 32.29 and MAI 4.01.

4.01 [2002 Revision] Damages – Personal and Property

(Approved August 28, 2001; Effective January 1, 2002)

If you find in favor of plaintiff,[1] then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future] [2] as a direct result of the occurrence [3] mentioned in the evidence. [If you find that plaintiff failed to mitigate damages as submitted in Instruction Number ___, in determining plaintiff's total damages you must not include those damages that would not have occurred without such failure.] [4]

Notes on Use (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

1. If there is a counterclaim, add the words "on plaintiff's claim for damages".

2. This may be added if supported by the evidence.

3. When the evidence discloses a compensable event and a non-compensable event, both of which are claimed to have caused damage, the term "occurrence" may need to be modified. See *Vest v. City National Bank & Trust Co.*, 470 S.W.2d 518 (Mo. 1971). When the term "occurrence" is modified,

substitute some descriptive phrase that specifically describes the compensable event or conduct. As an example, if the plaintiff claims plaintiff sustained damages as a direct result of negligent medical care while being treated for a non-compensable fall or illness, the instruction may be modified to read, "...as a direct result of the conduct of defendant as submitted in Instruction Number ___ (*here insert number of verdict directing instruction*)." As another example, if plaintiff sustained damages in an automobile collision but also had a non-compensable illness, the instruction may be modified to read "...as a direct result of the automobile collision."

In a case such as *Carlson v. K-Mart*, 979 S.W.2d 145 (Mo. banc 1980), where MAI 19.01 is used in the verdict director, delete the entire phrase "as a direct result of the occurrence mentioned in the evidence" from MAI 4.01 and substitute the phrase "that (*describe the compensable event or conduct*) directly caused or directly contributed to cause."

Other modifications also may be appropriate.

4. If failure to mitigate damages is submitted, this instruction must be modified by adding this bracketed sentence. See MAI 32.29 for the appropriate method of submission of failure to mitigate damages in cases other than FELA. For FELA cases, use MAI 32.07(A) and MAI 8.02.

This instruction should not be used in a comparative fault case. See MAI

37.03 for the damage instruction in a comparative fault case, and MAI 21.04 for the damage instruction in a comparative fault case involving health care providers.

See MAI 21.03 for the damage instruction in a case involving health care providers without comparative fault.

Committee Comment (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

This instruction is short, simple, and easily understood. Since no particular items of damage are set out, there is no risk of the jury being improperly instructed on damages not supported by the record.

During the instruction conference, the parties and the court should discuss (on the record) just what damages are supported by the evidence and can properly be argued to the jury. In this way, jury arguments can proceed without undue interruptions.

Rule 71.06 requires the jury verdict to separately state the amounts awarded for personal injuries and property damage.

In the past, varied approaches have been suggested for the manner of instructing on the issue of mitigation of damages. For example, the plurality opinion in *Love v. Park Lane Medical Center*, 737 S.W.2d 720 (Mo. banc 1987), suggested using a comparative fault approach. The product liability statute,

section 537.765, RSMo, also could be read to suggest a comparative fault approach. *Tillman v. Supreme Exp. & Transfer, Inc.*, 920 S.W.2d 552 (Mo. App. 1996), seemed to indicate that MAI 6.01 is the correct approach, although it also observed that MAI 6.01 is limited to wrongful death cases.

In fact, rather than the doctrine of avoidable consequences, MAI 6.01 submits a completely different type of mitigation (mitigating circumstances attendant upon the fatal injury in a wrongful death case pursuant to section 537.090, RSMo). *Tillman* also rejected the comparative fault approach to mitigation of damages. In order to avoid potential inconsistencies in alternative methods of submission (comparative fault approach in some cases, the FELA approach in other cases, and yet other possible approaches in other cases), the Committee has concluded that it is best to adopt a uniform approach to the submission of the doctrine of mitigation of damages in all cases as reflected in MAI 32.29 and the revision of MAI 4.01. This approach is both legally and logically correct and consistent with the approach already taken in FELA cases (See MAI 32.07(A) and MAI 8.02). It is also in compliance with the mandate of section 537.765 that failure to mitigate damages "shall diminish proportionately the amount awarded as compensatory damages..."; thus, the method of submission of mitigation of damages in a product liability case should utilize the approach taken in MAI 32.29 and MAI 4.01.

4.02 [1980 Revision] Damages – Property Only

(No Change)

Notes On Use (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

1. The phrase "fair market value" must be defined. Use the first paragraph of MAI 16.02.

2. The bracketed portion of the above instruction should be used only where loss of use is pleaded and supported by the evidence.

This instruction should be used in cases involving property damage only.

In those rare cases in which the cost of repair is the appropriate measure of damages (as recited in the Committee Comment), the instruction should read:

> If you find in favor of plaintiff, then you must award the plaintiff such sum as you may find from the evidence to be the reasonable cost of repair of any damage to (*here identify property*), [plus such sum as you may find from the evidence will fairly and justly compensate plaintiff for the loss of use thereof until such property could be reasonably repaired].

Where comparative fault is submitted in a case involving property damage only, this instruction should be modified in the format of MAI 37.03.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

4.10 [1980 Revision] Damages – Ejectment

(No Change)

Notes on Use (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

1. The phrase "fair market value" must be defined. Use the first paragraph of MAI 16.02.

2. Use only if there is evidence of waste committed by the defendant after notice of plaintiff's claim of possession.

3. If the notice of plaintiff's claim to possession was received by defendant more than five years prior to commencement of the action, the bracketed material must be modified to limit the period of damage to five years next preceding the filing of the action.

4. Use the parenthetical material if damage assessments for both waste and loss of rents and profits are supported by the evidence.

5. Use if there is evidence of the loss of rents and profits.

6. Use only if there is no evidence of either waste or loss of rents and profits. The jury's verdict supporting a writ of ejectment justifies the award of nominal damages without evidence of substantial damages.

7. The plaintiff is entitled to damages for loss of rents and profits between the date of the verdict and the date of restoration of possession; the monthly rate

is determined by the jury; the multiplication is performed and the judgment for such post-verdict damages is entered by the judge. Use bracketed material only when defendant holds possession on date of verdict, plaintiff's right of possession has not expired and there is evidence to support the jury's finding of the monthly rate.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

4.11 [1980 Revision] Damages – Uninsured Motor Vehicle – Suit Against Insurer Only

(No Change)

Notes on Use (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

1. This may be added if supported by the evidence.

2. In a non-hit-and-run case, in which there is no collision, an appropriate term such as "occurrence" must be substituted for the term "collision."

In a case such as *Carlson v. K-Mart*, 979 S.W.2d 145 (Mo. banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase "as a direct result of the collision mentioned in the evidence" from this instruction and substitute the phrase "that (*describe the compensable event or conduct*) directly caused or directly contributed to cause."

Other modifications also may be appropriate. For further discussion, see MAI 4.01.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

This instruction should be used only where a suit on uninsured motor vehicle coverage names the insurer as the single defendant and the operator of

the uninsured motor vehicle is not joined. This instruction should be used only where form of verdict MAI 36.14 is used.

This instruction requires the jury to define the amount of the plaintiff's damages but does not determine the amount of the judgment against the insurer. That amount is determined as a matter of law by the court.

The effect of the adoption of the doctrine of comparative fault upon a contractual right of recovery under uninsured motor vehicle coverage is unclear. If the law and the insurance policy permit the application of comparative fault in such a case, modify this instruction in accordance with the format of MAI 37.03.

4.18 [1991 New] Damages – Personal Injury and Loss of Consortium, Loss of Services or Medical Expenses – Spouse or Child Injured – Non-Comparative Fault Only

(No Change)

Notes on Use (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

1. Select appropriate word(s).

2. This may be added if supported by the evidence.

3. When the evidence discloses a compensable event and a non-compensable event, both of which are claimed to have caused damage, the term "occurrence" may need to be modified. See *Vest v. City National Bank and Trust Company*, 470 S.W.2d 518 (Mo. 1971). When the term "occurrence" is modified, substitute some descriptive phrase that specifically describes the compensable event or conduct. As an example, if the plaintiff claims plaintiff sustained damages as a direct result of negligent medical care while being treated for a non-compensable fall or illness, the instruction may be modified to read, " . . . as a direct result of the conduct of defendant as submitted in Instruction Number ____ (*here insert number of verdict directing instruction*)." As another example, if plaintiff sustained damages in an automobile collision but also had a non-compensable illness, the instruction may be modified to read " . . . as a direct result of the automobile collision."

In a case such as *Carlson v. K-Mart*, 979 S.W.2d 145 (Mo. banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase “as a direct result of the occurrence mentioned in the evidence” from this instruction and substitute the phrase "that (*describe the compensable event or conduct*) directly caused or directly contributed to cause.”

Other modifications also may be appropriate.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01. In a case involving combined primary and derivative claims, the law of Missouri has not yet developed to indicate whether mitigation of damages instructions may be given on both claims or only on the primary injury claim. The Committee takes no position on this issue.

5.01 [1996 Revision] Damages – Wrongful Death

(No Change)

Committee Comment (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

Section 537.090, RSMo, lists elements of compensable damage that were a part of the damage law before its enactment as well as permitting recovery for decedent's damages between injury and death. The separate elements of damage are properly a matter for argument and are not and should not be listed in this damage instruction.

During the instruction conference, the parties and the court should discuss (on the record) just what damages are supported by the evidence and properly can be argued to the jury. In this way, jury arguments can proceed without undue interruptions.

In *Bennett v. Owens-Corning Fiberglas Corporation*, 896 S.W.2d 464 (Mo. banc 1995), the Court held that aggravating circumstance damages of section 537.090, RSMo, are the equivalent of punitive damages and may be awarded only if accompanied by due process safeguards articulated in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1(1991). See Chapter 6.00 for the submission of aggravating and mitigating circumstances.

The Committee is unable to determine under existing Missouri law whether the doctrine of mitigation of damages/avoidable consequences (see MAI 32.29 and MAI 4.01) is applicable to wrongful death cases in addition to the statutory "mitigating circumstances attending the death" under section 537.090, RSMo (see MAI 6.01). Thus, the Committee takes no position on such issue.

6. 01 [1996 Revision] Wrongful Death – Mitigating Circumstances

(No Change)

Committee Comment (2002 New)

(Approved August 28, 2001; Effective January 1, 2002)

The Committee is unable to determine under existing Missouri law whether the doctrine of mitigation of damages/avoidable consequences (See MAI 32.29 and MAI 4.01) is applicable to wrongful death cases in addition to the statutory "mitigating circumstances attending the death" under section 537.090, RSMo (See MAI 6.01). Thus, the Committee takes no position on such issue.

21.03 [1988 New] Damages – Actions Against Health Care Providers – No Comparative Fault

(No Change)

Notes on Use (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

1. This may be added if supported by the evidence.

2. When the term “occurrence” must be modified, substitute some descriptive phrase that specifically describes the compensable event or conduct. The term “occurrence” may be modified in any case where the evidence discloses more than one event or health care provider that is claimed to have caused injury or damage. See Note 3 of the Notes on Use to MAI 4.01.

In a case such as *Carlson v. K-Mart*, 979 S.W.2d 145 (Mo. banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase “as a direct result of the occurrence mentioned in the evidence” from this instruction and substitute the phrase "that (*describe the compensable event or conduct*) directly caused or directly contributed to cause.”

Other modifications also may be appropriate.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

This is the damage instruction to be used in cases against health care providers for personal injury where no issue of plaintiff's comparative fault is submitted. See verdict form MAI 36.20 and MAI 36.21.

21.04 [1988 New] Damages – Actions Against Health Care Providers – Comparative Fault

(No Change)

Notes on Use (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

1. Insert if more than one defendant.

2. This may be added if supported by the evidence.

3. When the term "occurrence" must be modified, substitute some descriptive phrase that completely describes the compensable event or conduct. The term "occurrence" may be modified in any case where the evidence discloses more than one event or health care provider claimed to have caused injury or damage. The first example in Note 3 of MAI 4.01, ". . . as a direct result of the conduct of defendant as submitted in Instruction Number _____", is not appropriate in a comparative fault case because the jury is instructed to determine "total damages," which are obviously the direct result of the conduct of *both* the defendant *and* the plaintiff. The above-quoted example would inappropriately restrict the jury's assessment of damages to those damages solely caused by defendant's conduct.

For further discussion see MAI 37.03 and MAI 4.01.

In a case such as *Carlson v. K-Mart*, 979 S.W.2d 145 (Mo. banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase “as a direct result of the occurrence mentioned in the evidence” from this instruction and substitute the phrase "that (*describe the compensable event or conduct*) directly caused or directly contributed to cause.”

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

21.09 [1996 Revision] Damages – Actions Against Health Care Providers – Lost Chance of Survival – No Comparative Fault

(No Change)

Committee Comment (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

In lost chance of recovery (survival) actions, damages are determined in accordance with the method mandated by *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 684, n. 2 (Mo. banc 1992). See also section 538.205, RSMo, et seq., for actions against health care providers accruing on or after February 3, 1986.

During the instruction conference, the parties and the court should discuss (on the record) just what damages are supported and allowed by the law and the evidence and can be properly argued to the jury. In this way, jury arguments can proceed without undue interruption.

See Committee Comment to MAI 21.08.

The Committee is unable to determine under existing Missouri law whether the doctrine of mitigation of damages/avoidable consequences (See MAI 32.29 and MAI 4.01) is applicable to wrongful death cases in addition to the statutory "mitigating circumstances attending the death" under section 537.090, RSMo, (See MAI 6.01). Thus, the Committee takes no position on such issue.

21.11 [1996 Revision] Damages – Actions Against Health Care Providers – Lost Chance of Survival – Comparative Fault

(No Change)

Committee Comment (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

See Committee Comment to MAI 21.08 and MAI 21.09.

The Committee is unable to determine under existing Missouri law whether the doctrine of mitigation of damages/avoidable consequences (See MAI 32.29 and MAI 4.01) is applicable to wrongful death cases in addition to the statutory "mitigating circumstances attending the death" under section 537.090, RSMo. (See MAI 6.01). Thus, the Committee takes no position on such issue.

21.12 [1994 New] Damages – Actions Against Health Care Providers – Lost Chance of Recovery (Non-Death) Cases – No Comparative Fault

(No Change)

Notes on Use (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

1. This may be added if supported by the evidence.

2. The term "recovery" has reference to the recovery that could have been obtained if the negligently omitted or improper medical diagnosis or treatment had been properly rendered and had been successful. It does not necessarily mean a complete recovery. The phrase "absence of recovery," under appropriate circumstances, may be modified to expand or clarify this concept.

3. Select a term.

This is the damage instruction to be used in actions against health care providers for lost chance of recovery ("lost limb") cases where no issue of plaintiff's comparative fault is submitted. See verdict form MAI 36.26.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

21.15 [1994 New] Damages – Actions Against Health Care Providers – Lost Chance of Recovery (Non-Death) Cases – Comparative Fault

(No Change)

Notes on Use (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

1. Insert if more than one defendant.

2. This may be added if supported by the evidence.

3. The term "recovery" has reference to the recovery that could have been obtained if the negligently omitted or improper medical diagnosis or treatment had been properly rendered and had been successful. It does not necessarily mean a complete recovery. The phrase "absence of recovery," under appropriate circumstances, may be modified to expand or clarify this concept.

4. Select a term.

This is the damage instruction to be used in actions against health care providers for lost chance of recovery ("lost limb") cases where plaintiff's comparative fault is submitted. See verdict form MAI 36.27.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

37.03 [1986 New] Comparative Fault – Damages

(No Change)

Notes on Use (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

1. Insert if more than one defendant.

2. This may be added if supported by the evidence.

3. When the evidence discloses a compensable event and a non-compensable event, both of which are claimed to have caused damage, the term "occurrence" may need to be modified. See *Vest v. City National Bank & Trust Co.*, 470 S.W.2d 518 (Mo. 1971). When the term "occurrence" is modified, substitute some descriptive phrase that specifically describes the compensable event.

The first example in Note 3 of MAI 4.01, ". . . as a direct result of the conduct of defendant as submitted in Instruction Number _____", is not appropriate in a comparative fault case because the jury is instructed to determine "total damages," which are obviously the direct result of the conduct of *both* the defendant *and* the plaintiff. The above-quoted example would inappropriately restrict the jury's assessment of damages to those damages solely caused by defendant's conduct.

In a simple comparative fault case, the first example in Note 3 of MAI 4.01, ". . . as a direct result of the automobile collision", may be an appropriate modification of the word "occurrence" if plaintiff sustained damage in an automobile collision but also had a non-compensable illness.

In a case such as *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo. banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase "as a direct result of the occurrence mentioned in the evidence" from this instruction and substitute the phrase "that (*describe the compensable event or conduct*) directly caused or directly contributed to cause."

In a more complex comparative fault case, it may be more appropriate to delete the entire phrase ". . . as a direct result of the occurrence mentioned in the evidence" and substitute the phrase "that the [fault][a] [condition of the product][b] [failure] [c] of the defendant directly caused or directly contributed to cause."

a. b. c. Select the appropriate term. If there is more than one defendant, or theory, more than one term may be appropriate.

a. The term "fault" will generally be appropriate.

b. The term "condition of the product" may be used in those cases involving product liability under MAI 25.04 and MAI 25.05.

c. The term "failure" may be used in those cases involving submission under instructions such as MAI 22.02, MAI 22.03, MAI 22.05, MAI 22.07, and

similar instructions in which the defendant's actionable conduct is described as a "failure" as opposed to "negligence".

Other modifications may also be appropriate. See MAI 4.01 for further discussion.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

37.08 [1991 New] Comparative Fault – Damages – Personal Injury and Loss of Consortium, Loss of Services or Medical Expenses – Spouse or Child Injured

(No Change)

Notes on Use (2002 Revision)

(Approved August 28, 2001; Effective January 1, 2002)

1. Insert if more than one defendant.

2. Select appropriate word(s).

3. This may be added if supported by the evidence.

4. When the evidence discloses a compensable event and a non-compensable event, both of which are claimed to have caused damage, the term "occurrence" may need to be modified. See *Vest v. City National Bank & Trust Co.*, 470 S.W.2d 518 (Mo. 1971). When the term "occurrence" is modified, substitute some descriptive phrase that specifically describes the compensable event.

The first example in Note 3 of MAI 4.01, ". . . as a direct result of the conduct of defendant as submitted in Instruction Number _____", is not appropriate in a comparative fault case because the jury is instructed to determine "total damages," which are obviously the direct result of the conduct of *both* the defendant *and* the plaintiff. The above-quoted example would

inappropriately restrict the jury's assessment of damages to those damages solely caused by defendant's conduct.

In a simple comparative fault case, the first example in Note 3 of MAI 4.01, ". . . as a direct result of the automobile collision", may be an appropriate modification of the word "occurrence" if plaintiff sustained damage in an automobile collision but also had a non-compensable illness.

In a case such as *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo. banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase "as a direct result of the occurrence mentioned in the evidence" from this instruction and substitute the phrase "that (*describe the compensable event or conduct*) directly caused or directly contributed to cause."

In a more complex comparative fault case, it may be more appropriate to delete the entire phrase ". . . as a direct result of the occurrence mentioned in the evidence" and substitute the phrase "that the [fault][a] [condition of the product][b] [failure] [c] of the defendant directly caused or directly contributed to cause."

a. b. c. Select the appropriate term. If there is more than one defendant, or theory, more than one term may be appropriate.

a. The term "fault" will generally be appropriate.

b. The term "condition of the product" may be used in those cases involving product liability under MAI 25.04 and MAI 25.05.

c. The term “failure” may be used in those cases involving submission under instructions such as MAI 22.02, MAI 22.03, MAI 22.05, MAI 22.07, and similar instructions in which the defendant’s actionable conduct is described as a “failure” as opposed to “negligence”.

Other modifications may also be appropriate. See MAI 4.01 for further discussion.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01. In a case involving combined primary and derivative claims, the law of Missouri has not yet developed to indicate whether mitigation of damages instructions may be given on both claims or only on the primary injury claim. The Committee takes no position on this issue.